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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,	)	NO. 12-CR-750-LHK
	)	
Plaintiff,	)	<b>GOVERNMENT'S SENTENCING</b>
	)	<b>MEMORANDUM</b>
v.	)	
	)	Sentencing Hearing: January 21, 2015 at 9:30 am
ELENA MORENO,	)	
	)	
Defendants.	)	
	)	
	)	

The United States, by and through Melinda Haag, United States Attorney, and the undersigned attorneys, hereby submits its memorandum regarding the sentencing of Defendant Elena Moreno (hereinafter "the Defendant" or "Defendant Elena Moreno").

The Presentence Investigation Report ("PSR") determined that the total offense level was 24 and

GOVERNMENT'S SENTENCING MEMORANDUM  
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the criminal history category was I. The corresponding Guidelines' range is 51 to 63 months' imprisonment. *See* PSR ¶¶ 27-47. The United States agrees with the PSR's recitation of the relevant facts, except as otherwise noted. Aside from a mathematical issue regarding the calculation of loss for Count 13, the United States also agrees with the PSR's calculation of the sentencing Guidelines' range. The United States does not, however, agree with the PSR's calculation of restitution.

For the reasons set forth in detail below, the Government recommends that the Court impose a sentence of 33 to 37 months' imprisonment. The Government further requests that the Court order restitution to the financial institutions, which include Wells Fargo and NationStar Mortgage. The Government reserves the right to supplement this memorandum with testimony and argument at the sentencing hearing.

## **I. BACKGROUND**

The government incorporates the factual background in the PSR and Defendant Elena Moreno's plea agreement.

A federal grand jury sitting in the Northern District of California originally returned an indictment against the Defendant Elena Moreno and Defendants Arturo and Fidencio Moreno in October 2012. [ECF No. 1] This indictment charged all of the defendants with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. The defendants were also charged with filing false tax returns, in violation of 26 U.S.C. § 7206(1).

In January 2014, a federal grand jury returned a superseding indictment against Defendants Elena, Fidencio, and Arturo Moreno. [ECF No. 64] In addition to the charges in the original indictment, the superseding indictment charged all of the defendants with conspiracy to commit bank fraud and wire fraud, in violation of 18 U.S.C. § 1349. Defendants Elena and Fidencio Moreno were

1 also charged with making false statements on loan applications that were submitted to various financial  
2 institutions, in violation of 18 U.S.C. § 1014. *Id.*

3 On August 20, 2014, the Defendant pled guilty to Counts 1 and 13 of the superseding indictment,  
4 which charged her with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and  
5 conspiracy to commit bank fraud and wire fraud, in violation of 18 U.S.C. § 1349. [ECF No. 100, 101]

6 As set forth in the Defendant's plea agreement, the conduct underlying Count 1 centers upon the  
7 failure of the Defendant and her coconspirators, Fidencio Moreno ("Fidencio") and Arturo Moreno  
8 ("Arturo") to report all of the gross receipts for a charter bus company known as Quality Assurance  
9 Travel ("QAT"). [ECF No. 101] Much of the unreported income for QAT were cash receipts from  
10 customers, which were earned and paid in conjunction with QAT's contract with the Chuckchansi Gold  
11 Resort and Casino located in Coarsegold, California. The conspiracy lasted from at least 2005 through  
12 July 2010, when special agents from the Criminal Investigation division of the Internal Revenue Service  
13 ("IRS-CI") executed a search warrant on QAT's offices in San Jose, California.  
14

15 During the conspiracy, Defendant Elena Moreno was married to Fidencio, one of the two co-  
16 owners of QAT. Defendant Elena Moreno also worked as an employee of QAT. Her duties included  
17 making entries into the books and records for QAT, including QuickBooks. The Defendant also made  
18 deposits into the QAT business bank account, and provided information to the accounting firm that  
19 prepared the federal income tax returns for QAT, a subchapter S Corporation, and the personal income  
20 tax return for Defendants Arturo, Fidencio and Elena Moreno. PSR ¶¶ 9-11, 75. Defendant Elena  
21 Moreno, along with her coconspirators, falsely told the accounting firm that the records provided for  
22 QAT and for preparation of their personal returns were accurate, when in fact she knew that these  
23 records intentionally failed to include a substantial amount of gross receipts from QAT. As a result, the  
24 individual income tax returns for the Defendant and her coconspirators were false, in that they  
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27

1 substantially underreported their income and consequently the taxes due on that income. For tax years  
2 2005 through 2009, the total amount of unreported gross receipts exceeded \$966,908. The total tax loss  
3 caused by the conspiracy was \$214,618.

4 With respect to Count 13, the conspiracy to commit wire fraud and mail fraud began in at least  
5 2005 and continued through at least July 2013. PSR ¶¶ 15-22. During that time period, Defendant  
6 Elena Moreno and her coconspirators, Fidencio and Arturo, caused false and fraudulent loan  
7 applications to be submitted to various financial institutions, including Wells Fargo Bank, Washington  
8 Mutual Bank, Lehman Brothers Bank FSB, First Franklin Financial Corporation, NationStar Mortgage,  
9 and National City Bank.  
10

11 Based on these false and fraudulent loan applications, Defendant Elena Moreno and her  
12 coconspirators were approved for home mortgages and home equity lines of credit, which were used to  
13 purchase and/or refinance real property located in and around San Jose, California. These properties  
14 included 5832 Cadiz Drive (“Cadiz”), 5839 Chesbro Avenue (“Chesbro”), 7535 Bayliss Place  
15 (“Bayliss”), and 5937 Hillview Ave (“Hillview”).  
16

17 These applications were false and fraudulent because they overstated the assets and income of  
18 the applicant(s). Some of the applications, such as the applications for Chesbro and for the refinance of  
19 Bayliss, also falsely stated that the applicant intended to occupy the property as his/her primary  
20 residence. As part of and in furtherance of the conspiracy, Defendant Elena Moreno submitted an  
21 application for a \$111,600 home equity line of credit on Bayliss, in which she made false claims  
22 regarding her employment, assets, and income. *See* Ex. 1, at 1-2. That same month, she and Fidencio,  
23 her husband and coconspirator, had submitted a false and fraudulent loan application to Washington  
24 Mutual Bank for the purchase of obtaining a loan to purchase Hillview, in which they overstated their  
25 income and assets, and understated their liabilities.  
26

1 In 2011, the conspiracy continued when the defendants fell behind on their mortgage payments  
2 for the four properties that they had purchased and/or refinanced using fraudulently-obtained loans.  
3 Ex. 2, at 1-2, 16-25. In an attempt to avoid foreclosure, Defendant Elena Moreno and her coconspirators  
4 agreed to seek to modify the terms and conditions of the loans on the properties. With the assistance of  
5 a company known as MJ Consulting, Defendant Elena Moreno and her codefendants submitted false and  
6 fraudulent loan modification applications, which understated their income and assets. *See* Ex. 3  
7 (example documents submitted to NationStar); *compare id.* at 11-13 to Ex. 4 (documents submitted to  
8 tax return preparer).  
9

10 Defendant Elena Moreno and her codefendants also submitted false and fraudulent supporting  
11 documentation, including statements regarding the amount of rental income that they were purportedly  
12 receiving from some of the properties. Ex. 3, at 15-20. Documents obtained from MJ Consulting show  
13 that Defendant Elena Moreno coordinated, provided, and caused to be provided the false and fraudulent  
14 documents submitted to the financial institutions in support of the loan modification requests. EX. 5, at  
15 39-76. Documents obtained from MJ Consulting show that the conspiracy was successful, with two of  
16 the financial institutions approving loan modifications requests based on the false and fraudulent  
17 applications. Ex. 2, at 4-14, 26-32. The loan modifications were approved for the Hillview and Cadiz  
18 properties in September and June 2013, respectively. *Id.*  
19

20 As a result of the false and fraudulent modification requests, the financial institutions reduced the  
21 principal balances on the loans on Cadiz and Hillview by \$39,627.60 and \$53,576.08, respectively. *Id.*;  
22 *see also* Ex. 5, at 65-66, 69-74. This loss was borne by the financial institutions, Bank of America for  
23 Cadiz and Wells Fargo Bank for Hillview. The beneficiaries of this fraud were Defendant Elena  
24 Moreno and her coconspirators, Fidencio and Arturo. In addition to reducing the mortgage principal due  
25 to these fraudulent loan applications, the financial institutions also reduced the monthly payments on the  
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1 mortgages for Hillview and Cadiz. Ex. 2, at 4-14, 26-36. To date, Defendant Elena Moreno and  
 2 Fidencio are still living in Hillview, while their coconspirator Arturo continues to reside in Chesbro.

3 Bayliss was sold via short sale in August 2013, causing a loss to Wells Fargo bank.<sup>1</sup> Chesbro  
 4 was foreclosed by NationStar Mortgage in May 2014, resulting in a loss to NationStar Mortgage.<sup>2</sup> The  
 5 losses to both financial institutions include past-due mortgage interest and costs associated with the  
 6 foreclosure, including legal fees incurred when Defendants Elena Moreno and her coconspirator,  
 7 Fidencio, filed for bankruptcy. All of the bankruptcy filings were dismissed for failure to file the  
 8 required schedules. The bankruptcy filings did, however, have the effect of delaying the foreclosures of  
 9 these properties, which were pending at the time the bankruptcy petitions were filed.  
 10

#### 11 **a. Objections to the PSR**

12 The government hereby makes the following objections to the PSR, and respectfully requests  
 13 that the following corrections be made.

##### 14 *i. Count 13 – Loss Calculations*

15 **Bayliss loss calculations (2013 short sale):** The PSR incorrectly states that the loss to Wells  
 16 Fargo for the purpose of Guidelines calculations from the short sale of Bayliss was only \$96,000. PSR ¶  
 17 20. This calculation is incorrect, however, and should be changed as follows: With regards to the loss  
 18 calculations under the Guidelines, the PSR errs in calculating loss by subtracting the unpaid principal on  
 19 the Wells Fargo loan, \$521,000, from the total sales price \$425,000 shown on the HUD-1. This  
 20 calculation is incorrect because, as shown on the HUD-1, not all of the \$425,000 went to Wells Fargo  
 21 bank. Rather, a significant portion of the \$425,000 was paid to third parties, such as the real estate  
 22 agents and the title company. The actual loss to Wells Fargo, excluding interest, is shown on the  
 23  
 24

25 <sup>1</sup> The government objects to the PSR's loss calculations and restitution amounts for the Bayliss  
 property as detailed *infra*.

26 <sup>2</sup> The government objects to the PSR's loss calculations and restitution amounts for the Chesbro  
 27 property, as detailed *infra*.

1 attached Exhibit 6. Exhibit 6 shows the realized loss calculations performed by Wells Fargo Bank;  
 2 Exhibit 6 is a certified business record. To determine the loss for the purposes of calculating the  
 3 Defendant's Guidelines range, the PSR should have used the total expenses of \$595,998.78 (line 19 on  
 4 Ex. 6), less interest of \$58,558.19 (line 2 on Ex. 6), which is excludable under § 2B1.1 cmt. 3(D)(i), less  
 5 the proceeds that Wells Fargo bank actually *received* from the sale of the property, \$392,439.19 (line 25  
 6 on Ex. 6). The total loss to Wells Fargo Bank should thus be \$145,001.38 (\$595,998.78-\$58,558.19-  
 7 \$392,439.19). The sales price of \$425,000 is not relevant here and should not be used in the calculation.  
 8 Rather, the \$392,439.19 should be used under § 2B1.1. because it reflects what the victim, Wells Fargo  
 9 Bank, actually recovered by the time of the Defendant's sentencing, from the disposition of the  
 10 collateral. *See* § 2B1.1 cmt. 3(E)(ii).

12 **Chesbro forgiveness of indebtedness (2012):** In 2012, Wells Fargo Bank forgave a separate  
 13 home equity line of credit valued at \$33,578.35. This home equity line of credit was associated with the  
 14 Chesbro property. When the loan was forgiven, the loss that borne by Wells Fargo Bank and the  
 15 defendant made no further repayments. The loss from the line of credit is shown at Exhibit 8. As shown  
 16 by the date of the Form 1099-C issued by Wells Fargo Bank, this home equity line of credit was  
 17 obtained and then terminated long before Chesbro was foreclosed upon by NationStar Mortgage in  
 18 2014. Accordingly, this 2012 home equity line of credit is separate and apart from the loss caused to  
 19 NationStar Mortgage when it foreclosed on Chesbro in 2014 and was never, to the government's  
 20 knowledge, recouped by Wells Fargo in any way. *See* Ex. 9. The PSR should not omit this loss to  
 21 Wells Fargo from the statement of facts, loss calculations for the purposes of determining the Guidelines  
 22 range, and restitution determination; these errors should be corrected. *See* PSR ¶¶ 21, 94, 34. The  
 23 government respectfully requests that the amount of the home equity line of credit that Wells Fargo  
 24 forgave in 2012 as to Chesbro be included in the loss calculations, with the amount equal to \$33,578.35.  
 25  
 26  
 27

**Chesbro loss calculations (2014 foreclosure by NationStar):** The PSR incorrectly states that the loss to NationStar mortgage for the purpose of Guidelines calculations from the foreclosure of Chesbro in 2014 was only \$123,000. PSR ¶ 21. This calculation is incorrect, however, and should be changed as follows: With regards to the loss calculations under the Guidelines, the PSR errs in calculating loss by subtracting the unpaid principal on the NationStar loan, \$533,600, from the raw sales price \$544,000 shown on the HUD-1. This calculation is incorrect because, as shown on the HUD-1, not all of the \$544,000 went to NationStar mortgage. Rather, a significant portion of the \$544,000 was paid to third parties, such as the real estate agents and the title company. Of the sales price for the foreclosure, NationStar only received \$485,161.29. The actual loss to NationStar mortgage, excluding interest, is shown on the attached Exhibit 9. Exhibit 9 shows the realized loss calculations performed by NationStar Mortgage; Exhibit 9 is a certified business record. To determine the loss for the purposes of calculating the Defendant's Guidelines range, the PSR should have used the total expenses of \$686,024.07 (Ex. 6, at 2), less \$119,504.31 of interest, which is excludible under § 2B1.1 cmt. 3(D)(i), less the proceeds that NationStar mortgage actually *received* from the sale of the property, which is \$485,161.29 (Ex. 6, at 1). Accordingly, the total loss to NationStar mortgage should be \$81,358.47 (\$686,024.07-\$119,504.31-\$485,161.29). The sales price of \$544,000 is not relevant here, because the \$485,161.29 reflects what the victim, NationStar, actually recovered by the time of the sentencing from the disposition of the collateral (house). *See* § 2B1.1 cmt. 3(E)(ii).

Thus, the total loss for the purposes of determining the Guidelines' range under § 2B1.1 is \$259,938.20. The PSR should be corrected to reflect this amount. *See* PSR ¶ 22.

*ii. Count 13 – Restitution Calculations*

**Bayliss restitution calculations (2013 short sale):** The PSR incorrectly states that the restitution amount owed to Wells Fargo for losses sustained due to the Bayliss short sale is equal to the loss amount



1 calculated under U.S.S.G. § 2B1.1, and is thus limited to \$96,000. PSR ¶¶ 20, 94. The PSR errs in not  
 2 including prejudgment interest in the restitution owed to Wells Fargo for the fraud regarding this  
 3 property.

4 The Ninth Circuit has expressly held that restitution for financial institutions that are the victims  
 5 of bank or wire fraud is calculated differently than the “loss” amount under U.S.S.G. § 2B1.1. *See*  
 6 *United States v. Morgan*, 376 F.3d 1002, 1014 (9th Cir. 2004) (holding “loss” for restitution purposes  
 7 can include interest and finances charges because they “directly result” from a defendant’s conviction  
 8 for bank or wire fraud, where the underlying conduct is making false statements on a loan application);  
 9 *see also United States v. Catherine*, 55 F.3d 1462, 1465 (9th Cir. 1995). Under 18 U.S.C. § 3663A,  
 10 however, restitution is permitted for all losses “directly resulting from the defendant’s offense.”  
 11 *Morgan*, 376 F.3d at 1014. The amount is the *actual* loss to the financial institution, which “can include  
 12 prejudgment interest,” as well as contractual interest and finance charges. *Id.*

14 Accordingly, the restitution amount in the PSR that is payable to Wells Fargo for the Bayliss  
 15 short sale should be corrected to include the prejudgment, contractual interest that the Defendant and her  
 16 coconspirators owed, and failed to pay, to Wells Fargo bank before the short sale. PSR ¶ 94. The total  
 17 restitution owed to Wells Fargo bank for the Bayliss property is \$203,559.59 (line 37 on Exhibit 6).  
 18 This amount is the difference between the total cost incurred by Wells Fargo related to the short sale  
 19 (\$595,998.78), less the amount that Wells Fargo received from the sale (\$392,439.19). Ex. 6.

21 **Chesbro forgiveness of indebtedness restitution (2012):** As described above, Wells Fargo  
 22 bank forgave a home equity loan line of credit as to Chesbro in 2012. Ex. 8. The total amount of debt  
 23 that was forgive was \$33,578.35. This debt was not recouped by Wells Fargo when Chesbro was  
 24 foreclosed in 2014, because Wells Fargo had already forgiven and written off the debt in 2012, years  
 25 before. Because Wells Fargo never received any collateral or repayment for this line of credit, the PSR  
 26

1 should be changed to include the amount of this home equity loan line of credit, \$33,578.35, as  
 2 restitution owed to Wells Fargo.

3 Considering both properties, the total restitution owed to Wells Fargo is \$237,137.94.

4 **Chesbro restitution calculations (2014 foreclosure):** The PSR incorrectly states that the  
 5 restitution amount payable to NationStar Mortgage for losses due to the Chesbro foreclosure in 2014 is  
 6 equal to the loss amount calculated under U.S.S.G. § 2B1.1, and is limited to \$123,000, at most. PSR ¶¶  
 7 21, 94. The PSR errs by not including prejudgment interest in the amount to be paid to NationStar  
 8 Mortgage for foreclosure of this property, which are permitted and proper for the same reasons  
 9 explained above regarding the Bayliss property. *See Morgan*, 376 F.3d at 1014; *Catherine*, 55 F.3d at  
 10 1465.  
 11

12 The restitution amount in the PSR that is payable to NationStar for the Chesbro foreclosure  
 13 should be corrected to include the prejudgment interest (\$119,504.31) that the Defendant and her  
 14 coconspirators owed, and failed to pay, to Wells Fargo bank before the short sale. PSR ¶ 94. The  
 15 restitution amount owed to NationStar for Chesbro property is thus \$202,597.28 (Ex. 9, at 1-2). This is  
 16 the difference between the total costs incurred by NationStar due to the foreclosure and subsequent sale  
 17 (\$686,024.07), less the amount that NationStar received from the sale (\$485,161.29). Ex. 9.  
 18

19 The total amount of restitution that the government is requesting is: \$202,597.28 to NationStar  
 20 Mortgage and \$237,137.94 to Wells Fargo Bank.

## 21 **II. APPLICABLE LAW**

22 Under *United States v. Booker*, 543 U.S. 220 (2005), the U.S. Sentencing Guidelines are no  
 23 longer mandatory. Rather, the “overarching statutory charge” is to “impose a sentence sufficient, but  
 24 not greater than necessary” to reflect the factors set forth in 18 U.S.C. § 3553(a)(2), including the  
 25 seriousness of the offense; the need to promote respect for the law and provide just punishment; to  
 26

1 afford adequate deterrence; to protect the public; and to provide the defendant with needed educational  
 2 or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a); *United States*  
 3 *v. Carty*, 520 F.3d 984, 991-92 (9th Cir. 2008) (en banc).

4 After *Booker*, sentencing proceedings should begin by determining the applicable Guidelines  
 5 range. *Carty*, 520 F.3d at 991. Although the Guidelines are no longer mandatory, the Guidelines range  
 6 can and should be considered “the starting point and the initial benchmark” and is “to be kept in mind  
 7 throughout the process.” *Id.* (quoting *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) and *Gall*  
 8 *v. United States*, 552 U.S. 38, 49 n.6 (2007)). After determining the Guidelines’ range, the Court should  
 9 then consider the § 3553(a) factors to decide if they support the sentence suggested by the parties. In  
 10 doing so, the Court may not presume that the Guidelines range is reasonable, nor give the Guidelines  
 11 range more or less weight than any other factor. If the Court decides that a sentence outside of the  
 12 applicable Guidelines’ range is warranted, it must consider the extent of the deviation and ensure that  
 13 the justification is sufficiently compelling to support the degree to which the sentence is outside the  
 14 applicable range. In pronouncing a sentence, the Court must explain the sentence it selects sufficiently  
 15 so as to permit meaningful appellate review.

16 What constitutes a “sufficient explanation,” will necessarily depend on the complexity of the  
 17 case and whether the chosen sentence is inside or outside of the Guidelines. A within-Guidelines  
 18 sentence “ordinarily” requires little explanation, unless specific departures have been requested, a  
 19 difference sentence has been sought, or the Guidelines calculation itself has been challenged. *Carty*, 520  
 20 F.3d at 991.

### 21 **III. DISCUSSION**

#### 22 **a. Guidelines’ Calculations**

##### 23 *i. Count 1 – Conspiracy to Defraud the United States*

The Government agrees with the probation officer's application of §§ 2T1.1-2T1.9 of the U.S. Sentencing Guidelines to determine the base offense level for Count 1. The total tax loss is \$214,618 for tax years 2005 through 2009, which corresponds to an offense level of 18. U.S.S.G. § 2T1.4(H). In this case, no specific offense or victim-related adjustments apply. Similarly, the Government agrees with the PSR that there should be no adjustment based on Defendant Elena Moreno's role in the offense. PSR ¶¶ 28-33. The evidence shows that Defendant Elena Moreno assisted with the bookkeeping for QAT during the course of the conspiracy. Records obtained during the search of QAT also show that she assisted with counting the unreported cash receipts earned by the business, and assisted with bank reconciliations. *See* Ex. 7. The Defendant was also involved in providing records to the accounting firm, which failed to include the unreported business receipts. The Defendant's role establishes not only her knowledge, but involvement in the central steps necessary to carry out and further the conspiracy to defraud the United States. The evidence also shows that the Defendant personally benefited from the cash receipts, which she and her coconspirators used in part to pay for personal living expenses.

*ii. Count 13 - Conspiracy to Commit Wire Fraud and Mail Fraud*

**Base Offense Level:** The Government agrees with the PSR and the probation officer's determination that §2B1.1(b)(16)(D) applies to this case, and thus determines the base offense level under § 2X1.1. PSR ¶ 34. In relevant part, § 2B1.1(b)(16)(D) provides that if "the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense...if the resulting offense level is less than level 24, increase to level 24." Here, the Defendant and her coconspirators derived approximately \$2,118,000 from different financial institutions, including Washington Mutual, Wells Fargo Bank, National City Bank, Lehman Brothers, and NationStar Mortgage. [ECF No. 101] Because § 2B1.1(b)(16)(D) applies and the Guidelines calculation must be

accurate so that the Court can have the correct starting point for a sentencing decision,, the Court should find that the base offense level is 24.<sup>3</sup>

**Leader/Organizer enhancement:** The Government agrees with the PSR that the offense level for Count 13 should be increased by two levels, pursuant to U.S.S.G. § 3B1.1(c), based on Elena's role and actions as a manager, supervisor, organizer, or leader, of the bank and wire fraud conspiracy. PSR ¶¶ 37, 19. Section 3B1.1(c) of the U.S. Sentencing Guidelines provides for a 2-level increase to the offense level if the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in §3B1.1(a) or (b).<sup>4</sup>

The agreed-upon facts regarding that bank and wire fraud conspiracy are set forth in the Defendant's plea agreement. [ECF No. 101, at 5-7] As relevant here, Defendant Elena Moreno admitted that there was an agreement among the coconspirators to submit false applications and documentation to the financial institutions in support of their loan modification requests. As part of the conspiracy, the Defendant and her coconspirators hired MJ Consulting to assist them in submitting the modification applications to the lenders.

Since the entry of Defendant Elena Moreno's plea, the government has obtained additional records from the company that assisted with the submission of the false and fraudulent loan applications,

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<sup>3</sup> Although the total offense level for Count 13 is 24, the Government respectfully requests that the Court impose a sentence that is consistent with the calculations contemplated in Defendant Elena Moreno's plea agreement, which had initially calculated the offense level for Count 13 as 21 or 23, because it mistakenly did not account for the applicability of §2B1.1(b)(16)(D). For a total offense level of 21 or 23, the low end of the Guidelines' range is 33 to 37 months' imprisonment. The Government believes that this downward variance properly and correctly accounts for the different factors under § 3553(a), including the various mitigation factors identified in the PSR and in this sentencing memorandum.

<sup>4</sup> The United States Sentencing Commission Aggravating and Mitigating Role Adjustments Primer §§3B1.1 and 3B1.2 clarifies the issues through advisory commentary. *See* U.S. Sentencing Commission, Primer Role Adjustment, *available at* [http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer\\_Role\\_Adjustment.pdf](http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Role_Adjustment.pdf).

1 MJ Consulting. Documents obtained from MJ Consulting confirm that Elena was the primary contact  
 2 between MJ Consulting and other members of the conspiracy. *See* Ex. 5. The evidence, particularly  
 3 documentation obtained from MJ Consulting, shows that Elena directed other participants, including the  
 4 employees of MJ Consulting, in furtherance of the goals of the conspiracy. She also organized and  
 5 managed the submission of documents on behalf of herself and her coconspirators, with the assistance of  
 6 MJ Consulting. Her role in these two capacities each independently supports a two-level enhancement  
 7 under U.S.S.G. § 3B1.1.

8  
 9 Although not co-conspirators, the employees of MJ Consulting constitute “participants” within  
 10 the meaning of § 3B1.1(c). According to the Adjustments Primer for the U.S. Sentencing Guidelines,  
 11 “[c]ourts ‘uniformly count’ as participants those who ‘were (i) aware of the criminal objective, and (ii)  
 12 knowingly offered their assistance.’” (*quoting United States v. Anthony*, 280 F.3d 694, 698 (6th Cir.  
 13 2002)). The *Primer* further clarifies that “the definition of ‘participant’ is broader than conspiratorial  
 14 liability.” *Id.* at 2. The *Primer* also notes that “the defendant, as a criminally responsible person, is a  
 15 participant for purposes of counting the number of participants under §3B1.1.” (*citing United States v.*  
 16 *Paccione*, 202 F.3d 622, 625 (2nd Cir. 2000)(emphasis in original)). *Primer* at 2. Here, the evidence  
 17 shows that Defendant Elena Moreno coordinated the conspiracy’s response during the pendency of the  
 18 fraudulent loan modification applications, negotiated and determined what documents would be  
 19 provided to MJ Consulting, and had a central role in communicating/obtaining the documents, including  
 20 documents created by her coconspirators in furtherance of the conspiracy.

21  
 22 A defendant may qualify for a “managerial” enhancement based on circumstantial evidence that  
 23 the defendant directed other participants to take steps in furtherance of the conspiracy. For example, an  
 24 individual may have a managerial role within a drug conspiracy if he directs others to deliver drugs: For  
 25 example, in *United States v. Gadson*, 763 F.3d 1189 (9th Cir. 2014), the Ninth Circuit held that the  
 26

1 district court did not abuse its discretion in applying an enhancement under § 3B1.1 when the defendant  
2 “oversaw” a “participant in the offense,” who transported drugs as part of the drug conspiracy at the  
3 defendant’s direction, even though the participant was not named in the indictment. *Id.* at 1222.

4 In evaluating the appropriateness of an enhancement under § 3B1.1, the Ninth Circuit has  
5 considered not only whether a defendant managed indicted or unindicted co-conspirators – which is in  
6 itself sufficient – but also whether the defendant “exercised decision making authority” or “functioned in  
7 an organizational role” in the conspiracy. *See United States v. Rivera*, 527 F.3d 891, 908-09 (9th Cir.  
8 2008) (citing *United States v. Ponce*, 51 F.3d 820, 827 (9th Cir. 1995)). In *Rivera*, the Ninth Circuit  
9 cited with approval cases analyzing whether the defendant had coordinated the conspiracy, negotiated on  
10 behalf of the conspiracy, and made decisions regarding the when, where, and to whom drugs would be  
11 sold. Similarly, in *United States v. Ingham*, 486 F.3d 1068, 1074-75 (9 Cir. 2007), the Court of Appeals  
12 made clear that “exercis[ing] some degree of control” or “organizational authority over others” can be  
13 sufficient to sustain an enhancement under § 3B1.1. “Organizational authority” can include organizing  
14 others “for the purpose of carrying out the crime.” *Id.* at 1074.  
15  
16

17 In this case, the evidence shows that MJ Consulting employees were aware of the false  
18 statements that Elena instructed them to submit to lenders, and still continued to offer their assistance in  
19 submitting the loan modifications and seeking their approval with the financial institutions. *Compare*  
20 *Anthony*, 280 F.3d 694 (holding that an attorney who conveyed the defendant’s false statements to  
21 others but did not know the statements were false could not be considered a “participant.”). For  
22 example, according to MJ Consulting records, on October 17, 2013, an MJ Consulting employee spoke  
23 to Defendant Elena Moreno regarding documents requested by the underwriter who was review one of  
24 the loan modification applications. According to the notes in MJ Consulting’s file, Defendant Elena  
25 Moreno told MJ Consulting that she did not want to send the documents because “they already prepared  
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1 the taxes and it shows a lot of money,” Ex. 5, at 51. Elena’s statement implies that the taxes had  
2 different information than the other documents that had been submitted to the financial institutions,  
3 thereby putting MJ Consulting on notice that the documents they received from the Morenos were false.  
4 One of the documents that MJ Consulting had submitted on behalf of the conspiracy were letters in  
5 which coconspirator Fidencio claimed that the QAT was struggling financially, and that business was  
6 substantially less than in prior years. Despite that knowledge, MJ Consulting continued to participate by  
7 submitting those fraudulent documents to financial institutions on behalf of the conspirators.  
8

9 Far from being an isolated incident, the MJ Consulting records reveal other evidence of false  
10 statements in the documents provided by the conspiracy. On May 30, 2013 an underwriter informed MJ  
11 Consulting that the loan modification application had claimed that the Chesbro property was both a  
12 primary residence and that it was rented; two mutually exclusive claims. Ex. 5, at 44. On June 19, 2013,  
13 MJ Consulting was informed that the rent claimed on the loan modification applications differed from  
14 the rent reflected on the bank account statements. *Id.* at 45. On February 18, 2013 the underwriter  
15 notified MJ Consulting of numerous contradictions and falsities in documents submitted by the  
16 Morenos, including the omission of two properties from the 2011 tax return they submitted. *Id.* at 69.  
17

18 As noted throughout those records, Defendant Elena Moreno was the primary contact between  
19 MJ Consulting and the coconspirators. According to employees for MJ Consulting, they primarily  
20 interacted and corresponded with Defendant Elena Moreno to obtain supporting documentation for the  
21 loan modification requests, including fraudulent supporting documentation. Specifically, the MJ  
22 Consulting records refer to numerous requests from the underwriters of the loan modification  
23 applications that were transmitted to the conspiracy by MJ Consulting, through Defendant Elena  
24 Moreno. For example, on April 19, 2013 the underwriters asked for a mortgage statement, utility bills,  
25 or letter of explanation and MJ Consulting informed Elena of the request. Ex. 5, at 42. Three days later,  
26  
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1 a mortgage statement was sent by MJ Consulting, which always obtained the requested documents  
2 directly from the conspirators. *Id.* On August 9, 2013, the records reflect that an underwriter requested  
3 paystubs, a request that MJ Consulting communicated to Defendant Elena Moreno. Less than a week  
4 later, MJ Consulting sent the requested documents. *Id.* at 47.. Similar transactions occurred during the  
5 period of August 21 to 26, 2013 (*id.* at 48); February 7-8, 2013 (*id.* at 55); April 15-22, 2013 (*id.* at 57);  
6 and January 22-29, 2013 (*id.* at 68). Elena was responsible for managing the submission of documents,  
7 which supported the fraudulent loan modification applications. The notes for MJ Consulting show that  
8 these submissions to the underwriter were material to the ultimate approval of the loan modification  
9 applications for Hillview and Cadiz. The evidence is not consistent with any suggestion that Defendant  
10 Elena Moreno merely acted as a “go-between.” Rather, her managerial role is shown in part through her  
11 authority to decide what documents would be provided to MJ Consulting, and perhaps more tellingly,  
12 what documents *would not* be passed along to the underwriters.  
13

14       Among the documents that were submitted to support the loan modification applications were  
15 receipts purportedly signed by the tenants of the different properties, including coconspirator Arturo and  
16 the family members residing in Chesbro. Other documents include letters of explanation signed by  
17 coconspirator Fidencio. Because MJ Consulting communicated with Defendant Elena Moreno, the  
18 submission of these documents shows her role in coordinating and organizing the conspiracy’s response,  
19 including the creation of documents that would further the loan modification fraud. Directing  
20 coconspirators to take steps in furtherance of the conspiracy, such creating rental receipts and letters,  
21 warrants an enhancement under § 3B1.1(c).  
22

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24       **iii. Total Offense Level**  
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1 The Government agrees with the PSR that the total combined adjusted offense level is 27, and  
 2 that the total offense level, after applying the adjustments for acceptance of responsibility, is 24. PSR ¶¶  
 3 40-47.

4 **b. Section 3553(a) Factors**

5 The factors set forth in Title 18, United States Code, Section 3553(a) include: (1) the nature and  
 6 circumstances of the offenses; (2) the history and characteristics of the defendant; (3) the need for the  
 7 sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just  
 8 punishment for the offense; (4) the need for the sentence to afford adequate deterrence to criminal  
 9 conduct; (5) the need for the sentence to protect the public from further crimes of the defendant; (6) the  
 10 need to provide the defendant with educational and vocational training, medical care, or other  
 11 correctional treatment in the most effective manner; (7) the kinds of sentences available; (8) the need to  
 12 provide restitution to victims; and (9) the need to avoid unwarranted sentencing disparity among  
 13 defendants involved in similar conduct who have similar records. 18 U.S.C. § 3553(a). As explained in  
 14 more detail below, the government believes that the recommended sentence of 33 to 37 months'  
 15 imprisonment accounts for both the aggravating and mitigating factors set forth in § 3553(a).  
 16  
 17

18 *i. The Nature and Circumstances of the Offense*

19 As set forth in Defendant's plea colloquy, plea agreement [ECF No. 100, 101] and the PSR, the  
 20 offenses to which Defendant Elena Moreno pled guilty reflect conscious, willful decisions that span  
 21 multiple years to perpetrate, continue, and even expand the fraud.

22 With respect to Count 13, the conspiracy to commit bank and wire fraud, the conduct spans  
 23 approximately 8 years. More troublingly, it continued until July 2013, after the Defendant and her  
 24 coconspirators knew they were under federal investigation because IRS-CI had executed a search  
 25 warrant at their business, and many months after the Defendant and her coconspirators had appeared in  
 26  
 27

1 front of the Court after they were indicted in October 2012 for conspiracy to defraud the United States  
2 and false tax returns. During that time period, the Defendant and her coconspirators submitted  
3 numerous applications to different financial institutions, which caused the approval of over \$2 million  
4 dollars in home mortgages and lines of credit. These loans were approved based on the false and  
5 fraudulent representations about the income and assets of the loan applicants, which included the  
6 Defendant and her husband, Fidencio. As the bookkeeper for QAT and wife of Fidencio, the Defendant  
7 knew that the information in the applications she submitted or cosigned was false and fraudulent. Far  
8 from suggesting that the Defendant was removed or unaware of the finances, the records for QAT and  
9 the personal bank accounts show that the Defendant was involved in everything from bookkeeping  
10 entries, to bank reconciliations, to writing/directing the issuance of checks on the different bank  
11 accounts. The false and fraudulent loan applications overstated the income and assets of the applicants  
12 by tens of thousands of dollars; in the case of one application, the Defendant falsely stated that she was  
13 the owner of QAT. As a result of their fraud, the Defendants successfully purchased and/or refinanced  
14 four different properties in San Jose: Hillview, Cadiz, Chesbro and Bayliss. From 2005 through 2013,  
15 the Defendant and her coconspirators enjoyed these fruits of their fraud. Without the fraudulently-  
16 obtained loans, the Defendant and her coconspirators would not have been able to purchase Hillview,  
17 Cadiz or Chesbro.

18  
19  
20 More recently, the evidence shows that the Defendant was heavily involved in attempting to  
21 keep the fruits of the fraudulent loan applications, through the submission of false and fraudulent loan  
22 modification applications, in some cases to the same financial institutions that were originally defrauded  
23 into lending money to the Defendant and her coconspirators. The evidence shows that the Defendant  
24 and her coconspirators succeeded in part with this fraud as well; the fraudulent loan modification  
25 applications that they submitted were approved as to the Cadiz and Hillview properties. *See Ex 2, 5.*

1 Based on the applications, the financial institutions forgave part of the principal for these fraudulently-  
2 obtained mortgages and lowered the monthly payments owed by the defendants.

3 In an attempt to keep the Chesbro and Bayliss properties, the Defendant filed for bankruptcy on  
4 three separate occasions. Each of these bankruptcy petitions was filed while the financial institutions  
5 were attempting to foreclose on the Bayliss and Chesbro properties, the latter of which was purchased  
6 using fraudulently-obtained loans. These bankruptcy filings, which were dismissed because the  
7 Defendant never filed the required schedules, had the effect of delaying the foreclosures, thereby buying  
8 more time to pursue fraudulent loan modifications as to these properties. These delays also caused  
9 additional losses to the financial institutions for Bayliss and Chesbro, in the form of legal expenses and  
10 unpaid interest on the loans.  
11

12 Count 1, the conspiracy to defraud the United States, is similarly characterized by years of  
13 intentional, willful conduct spanning multiple years. As with the conspiracy to commit wire fraud and  
14 bank fraud, the evidence shows that the Defendant personally benefited from this fraud. She and her  
15 coconspirators intentionally caused the accounting firm to file false tax returns by not reporting cash  
16 receipts, which were not entered in QuickBooks, deposited in the business bank account, or otherwise  
17 reported to the accountant. The Defendant knew about this unreported income because she personally  
18 received a portion of it; she also assisted in counting the cash receipts and preparing monthly invoices  
19 for the Chuckchansi Casino that meticulously tracked these cash receipts. *See* Ex. 7. As with the loan  
20 modification applications, the evidence shows that the Defendant frequently communicated with the  
21 accounting firm, and was often the individual who provided supporting documentation for preparation of  
22 the false and fraudulent tax returns.  
23  
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25 The occurrence of two separate frauds, which targeted not only the United States, but also  
26 multiple private financial institutions, is a cause for serious concern and is one of the reasons that a  
27

1 substantial sentence of imprisonment should be imposed in this case. Both of the schemes lasted for  
2 extended periods of time. Moreover, the evidence suggests that both would have continued, but for the  
3 detection and prosecution of the defendants for their actions. This conclusion is particularly warranted  
4 as to the bank and wire fraud conspiracy, which was ongoing for many months after tax-related charges  
5 were brought and while the case was pending before this Court. *See* Ex. 2, 3, 5.

6 As to both conspiracies, the evidence shows that the defendants took numerous conscious steps  
7 to continue them. In the case of Count 1, each year the defendants provided false and fraudulent records  
8 to the accounting firm. The records provided were carefully calculated to avoid disclosure or detection  
9 of the cash receipts.  
10

11 In this case, the Defendant participated in a conspiracy to submit multiple applications to  
12 fraudulently obtain loans from different financial institutions, then later submitted fraudulent loan  
13 modification applications in an attempt to keep the fruits of their fraud. The records show that the  
14 Defendant and her coconspirators submitted not just one fraudulent loan application, but multiple  
15 fraudulent loan applications over a series of years to different financial institutions in order to obtain  
16 additional, fraudulent loans. The defendants were able to obtain these loans, and thus  
17 purchase/refinance the real properties, while paying little to no money out of pocket for the properties.  
18 Although the Defendant and her coconspirators could have chosen to stop submitting fraudulent loan  
19 applications and using those loans to purchase additional properties, they chose to do exactly the  
20 opposite. Then, when the banks sought to foreclose on the properties, the Defendant and her  
21 coconspirators chose to fight the foreclosures and short sales by submitting false and fraudulent  
22 applications to modify the loans. *See* Ex. 5, 2. The persistence and continuation of the conspiracy  
23 through these fraudulent loan modification applications shows that the Defendant and her coconspirators  
24 were motivated at least in part by greed, and a desire to keep their ill-gotten gains from their fraud.  
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1           *ii. The History and Characteristics of the Defendant*

2           The government acknowledges that the Defendant may have had a difficult upbringing, as well  
3 as challenges associated with becoming a mother at a young age. PSR ¶¶ 57-73. The Defendant does  
4 not have a college education, but did receive a GED certificate in 1994, years before the offenses of  
5 which she was convicted in this case. *Id.* ¶ 73. The defendant has no prior convictions, and her two  
6 prior arrests occurred more than ten years ago. *Id.* ¶¶ 53-55. The government also notes that the Court  
7 can and should consider that the Defendant accepted responsibility by pleading guilty and paid  
8 restitution related to Count 1 in advance of her guilty plea. These mitigating factors are reasons why the  
9 government has asked that the Court impose a sentence of 33 to 37 months' imprisonment, which  
10 requires a downward variance from the Guidelines range.  
11

12           The Court should not, however, exercise its discretion to vary further from the Guidelines' range  
13 because these mitigating factors, while important to consider, nonetheless occurred many years before  
14 the conduct at issue. By the time the Defendant and her coconspirators chose to defraud the United  
15 States beginning in 2005, and also chose to commit bank fraud and wire fraud beginning in 2005, the  
16 Defendant had received her GED, had been married to Fidencio for approximately a decade, and had  
17 been working in various capacities as a receptionist for several years. As emphasized by the Guidelines  
18 and their attention to loss and attempted loss, the crimes that the Defendant chose to commit where, at  
19 their essence, financial crimes motivated by greed. The evidence shows that neither the Defendant nor  
20 her coconspirators needed or used the money that they obtained by their frauds to survive, or to provide  
21 the bare essentials for their family. Rather, the evidence shows that what the Defendant and her  
22 coconspirators wanted (and obtained) was millions of dollars in fraudulent loans. At the same time they  
23 sought and obtained loans that they were not entitled to, the Defendant and her coconspirators concealed  
24 nearly \$1 million dollars in unreported income from the IRS.  
25  
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1           iii. *The Need to Reflect the Seriousness of the Offense, Promote Respect for the Law, and*  
 2           *Provide Just Punishment*

3           A sentence of 33 to 37 months' imprisonment is sufficient, but no greater than necessary, to  
 4           promote respect for the law and provide just punishment. As discussed above, the Defendant's crimes  
 5           stem from the coconspirators' desire to conceal money from the IRS and obtain money and property  
 6           from private financial institutions to which they were not entitled. The tax returns and loan applications  
 7           vividly illustrate that the Defendant and her coconspirators willingly lied when, and as necessary, to  
 8           maximize their financial gain: When filing tax returns with the IRS, the Defendant and her  
 9           coconspirators consciously and purposefully underreported their income so they could pay less in taxes  
 10          and keep more money for themselves. When applying for loans, however, the Defendant and her  
 11          coconspirators knowingly and willfully overstated the applicant's income and assets and omitted  
 12          liabilities, to obtain money that did not belong to them and that they would not have received, had they  
 13          accurately disclosed their financial circumstances. The Court can and should take note that these  
 14          conspiracies overlapped, meaning that in some years the Defendant and her coconspirators were  
 15          submitting false loan applications overstating their income, sometimes just mere weeks or months before  
 16          affirming false tax returns *understating* their income to the IRS.

17  
 18          Although the Defendant has paid restitution to the IRS, the Defendant and her coconspirators  
 19          were successful in modifying the fraudulently-obtained loans for the Hillview and Cadiz properties, in  
 20          which they still reside. In effect, the Defendant and her coconspirators are still enjoying and benefiting  
 21          from some of the fruits of their crimes.

22  
 23          No further downward departure and/or variance is warranted as to this Defendant for any of  
 24          several reasons. First, the Government's recommended sentence is based on just a portion of the actual  
 25          loss suffered by the financial institutions; it does not take into account the losses suffered by the  
 26          financial institutions that modified the Hillview and Cadiz loans to reduce those loans' principals, based  
 27

1 on the fraudulent loan modification applications. Nor has the government sought a sentence based on  
2 the full amount of the fraudulently-obtained loans, although the Sentencing Guidelines do allow the  
3 Court to consider intended loss, which here would exceed \$2 million. *See* § 2B1.1, cmt. 3(A)(ii). Here,  
4 the evidence indicates that the object of the conspiracy was to obtain the entirety of these loan amounts  
5 for the personal use and benefit of the Defendant and her coconspirators.

6 Both of the crimes of which the Defendant stands convicted are serious, not only because of their  
7 duration, but due to the manner in which the Defendant and her coconspirators chose to carry them out.  
8 As set forth in the plea agreement, the Defendant and others agreed and coordinated the submission of  
9 false tax returns and loan applications. The planning and execution of this scheme reflects conscious,  
10 willful choices to knowingly violate the law. In the case of the conspiracy to commit wire and bank  
11 fraud, the Defendant and her coconspirators demonstrated sophistication in timing their applications to  
12 avoid the financial institutions discovering/detecting other loan applications that were pending at the  
13 same time. Despite warnings to provide true and accurate information, the Defendant and her  
14 coconspirators repeatedly chose to provide false and fraudulent information on the loan applications.

15 The actions of the Defendant and her coconspirators after they learned of the federal criminal  
16 investigation demonstrate a complete lack of respect for the law. For example, after IRS-CI executed a  
17 search warrant, the Defendant and her coconspirators switched accounting firms. When they initially  
18 met with the new accounting firm, neither the Defendant nor her coconspirators provided information on  
19 their cash receipts; only after the firm learned of the criminal case and asked for this information did the  
20 defendants provide some information about case receipts. Similarly, the Defendant's decision to file for  
21 bankruptcy in an effort to prevent the financial institutions from recouping properties that were the fruits  
22 of the fraud shows greed and a willingness to violate the law to further their own goals. Moreover, the  
23 Defendant and her coconspirator's decision to continue the bank and wire fraud conspiracy by  
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1 submitting fraudulent loan modification applications demonstrate a lack of respect for the law,  
 2 especially since this conspiracy continued after the Defendant had been charged in this very case with  
 3 tax-related crimes.

4 *iv. The Need for the Sentence Imposed to Afford Adequate Deterrence and to Protect the Public*

5 Adequate deterrence can only be accomplished through a lengthy term of imprisonment. Such a  
 6 sentence will make clear that violating the laws in question will not merely result in monetary penalties  
 7 that can be factored into the cost of such choices, but rather carry serious consequences designed to both  
 8 punish the conduct and deter others from engaging in it.  
 9

10 There is little question that many taxpayers seek to hide their income and do not report all of it to  
 11 the IRS. There is also little question that other current and would-be homeowners seek to apply for  
 12 loans, or loan modifications, to which they are not entitled. Deterring like-minded individuals cannot be  
 13 accomplished with a probationary sentence or monetary penalties alone. If anything, the Defendant and  
 14 her coconspirators' decision to continue with the bank and wire fraud conspiracy after being charged  
 15 with tax crimes appears to have been motivated in part by a calculated decision that they were unlikely  
 16 to be caught. Although the payment of restitution to the victims of the crimes is part of the Defendant's  
 17 plea and appropriate, a sentence of imprisonment is necessary to make crimes such as these not worth  
 18 committing. The punishment must be more than just the cost of doing business if criminal activity is to  
 19 be deterred.  
 20

21 There is a strong public interest in deterring the crimes implicated in this case. "Criminal tax  
 22 prosecutions serve to punish the violator and promote respect for the tax laws . . . Because of the limited  
 23 number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring  
 24 others from violating the tax laws is a primary consideration underlying these guidelines." U.S.S.G.  
 25 § 2T, intro. commn. Similarly, the number of criminal prosecutions for bank and wire fraud relative to  
 26  
 27

1 their incidence is small, making the same deterrence considerations applicable. The deterrence interest  
 2 is all the more pronounced in a case such as this one, where the duration is prolonged and the  
 3 participants dedicated to continuing the frauds. In the government's view, anything less than the  
 4 recommended sentence would send a problematic message, in part because the potential rewards from  
 5 committing these crimes (if not detected and thus left unpunished) can be so great. Had the Defendant's  
 6 and her coconspirators' crimes not have been detected, they would have reaped the illegal financial  
 7 windfall of evading taxes on nearly \$1 million dollars in income, and received over \$2 million dollars in  
 8 loans through fraudulent loan applications, then fraudulently induced the financial institutions to forgive  
 9 part of those fraudulently-obtained loans, while keeping the underlying real properties. A sentence that  
 10 includes a substantial period of incarceration is necessary to send a message to the community that this  
 11 conduct is not worth engaging in.  
 12

13 In determining the Defendant's sentence, the Court should also take into account the sentence for  
 14 her codefendant, Fidencio. Fidencio, who has pleaded guilty pursuant to Rule 11(c)(1)(C), has agreed  
 15 that an appropriate sentence is 41 months' of imprisonment. A sentence of 33 to 37 months'  
 16 imprisonment would help ensure that similarly-situated defendants receive similar treatment.  
 17

### 18 III. RESTITUTION & FORFEITURE

#### 19 a. Restitution

20 Under the MVRA, 18 U.S.C. § 3663A, a court must order a defendant to make restitution to a  
 21 victim of certain specified offenses, without considering the defendant's economic circumstances. *See*  
 22 *United States v. Yeung*, 672 F.3d 594 (9th Cir. 2012), *overruled in part on other grounds by Robers v.*  
 23 *United States*, 134 S.Ct. 1854 (2014). The MVRA defines "victim" as "a person directly and  
 24 proximately harmed as a result of the commission of the offense for which restitution may be ordered."  
 25 § 3663A(a)(2). In the "primary and overarching goal of [the MVRA] is to make victims of crime  
 26  
 27

1 whole, to fully compensate these victims for their losses and to restore these victims to their original  
2 state of well-being.” *United States v. Gordon*, 393 F.3d 1044, 1053 (9th Cir. 2004). In a fraud case,  
3 restitution to persons “directly and proximately harmed” by the fraud is mandatory. 18 U.S.C. §§  
4 3663A(a)(1), (2); *see also United States v. Carter*, 742 F.3d 440, 446 (9th Cir. 2014).

5 Section 3663A(b)(1) sets forth the framework for calculating restitution, which the Ninth Circuit  
6 has used in cases involving a defendant’s fraudulent scheme to obtained secured real estate loans from  
7 lenders. *Yeung*, 672 F.3d at 601 & n.4. Generally, the district court should calculate a direct lender’s  
8 loss by determining the amount of the unpaid principal balance due on the fraudulent loan, less the value  
9 of the real property collateral as of the date the direct lender took control of the property. *United States*  
10 *v. Hutchison*, 22 F.3d 846, 856 (9th Cir. 1993), *abrogated on other grounds by United States v. Wells*,  
11 519 U.S. 482 (1997).

13 Because restitution is meant to cover a victim’s actual losses, the Ninth Circuit has also approved  
14 restitution awards to include other amounts in fraudulent loan cases, such as prejudgment interest (using  
15 the government loan rate), interest still due on the loan, and expenses associated with holding the real  
16 estate collateral that were incurred by the lender before it took title to the property. *Id.* at 856; *see also*  
17 *Yeung*, 672 at 601; *see also Catherine*, 55 F.3d 1462, 1464-65 (9th Cir. 1995) (affirming restitution  
18 order that included prejudgment interest). A lender generally takes control on the date the lender either  
19 receives the net proceeds from the sale of the collateral to a third party at the foreclosure sale, or takes  
20 title to the real estate at the foreclosure sale. *Id.*

22 As discussed above, the government respectfully submits that the Court should order restitution  
23 consistent with the plea agreement, which includes losses associated with the Bayliss and Chesbro  
24 properties. These losses are discussed above: they include the 2012 forgiveness of indebtedness by  
25 Wells Fargo Bank as to Chesbro, the losses to Wells Fargo Bank associated with the 2013 short sale of  
26

1 Bayliss, and the losses to NationStar mortgage associated with the 2014 foreclosure of Chesbro. The  
 2 losses for which the government seeks restitution were the actual losses incurred by these financial  
 3 institutions and were not compensated by collateral or repayment. Further, consistent with *United States*  
 4 *v. Morgan*, 376 F.3d 1002, 1014 (9th Cir. 2004), the amount includes prejudgment interest, contractual  
 5 interest, and finance charges. It also includes other costs incurred by the respective financial institutions  
 6 that were associated with the actions in question, such as the foreclosure and/or short sale. Thus, the  
 7 total amount of restitution should be \$202,597.28 to NationStar Mortgage and \$237,137.94 to Wells  
 8 Fargo bank (\$33,578.35 for the debt that Wells Fargo forgave in 2012 as to Chesbro and \$203,559.59  
 9 for the Bayliss short sale).  
 10

11 Consistent with the plea agreement, the government has not and does not seek restitution for  
 12 losses associated with the other properties, Hillview and Cadiz. Consistent with its obligations under the  
 13 MVRA, the government does note that Bank of America and Wells Fargo are likely victims of Count 13  
 14 within the meaning of § 3663A, because both financial institutions reduced the principal on loans that  
 15 they held based on the false and fraudulent representations that the Defendant and her coconspirators  
 16 made in loan modification applications to them. *See* Ex. 4. As discussed above, Bank of America  
 17 reduced the principal on the Cadiz loan by \$39,627.60. Wells Fargo reduced the principal on the  
 18 Hillview loan by \$53,576.08. The government became aware of these losses after receiving discovery  
 19 pursuant to the subpoenas issued to prepare for sentencing in this case.  
 20

#### 21 **b. Forfeiture**

22 The government agrees with the PSR that the forfeiture is mandatory in this case because the  
 23 Defendant was convicted of a crime that provides for forfeiture as part of the penalty. *See* PSR ¶ 98, 18  
 24 U.S.C. § 982(a)(2)(A). The government would also note that the Defendant's plea agreement does not  
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 26  
 27

1 address forfeiture and there is no agreement regarding forfeiture. The government is addressing the  
2 question of forfeiture here because it was raised in the PSR.

3 Section 982(a)(2)(A) provides, in relevant part, that the court “in imposing sentence on a person  
4 convicted of a violation of, or a conspiracy to violate . . . (A) section . . . 1343, or 1344 of this title,  
5 affecting a financial institution . . . shall order that person forfeit to the United States any property  
6 constituting, or derived from, proceeds the person obtained directly or indirectly, as a result of such  
7 violation.” The Ninth Circuit has held that forfeiture is mandatory in cases where this statute applies.  
8 *Carter*, 742 F.3d at 446; *see also United States v. Monsanto*, 491 U.S. 600, 607 (1989); *United States v.*  
9 *Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011) (“the district court has no discretion to reduce or  
10 eliminate mandatory criminal forfeiture”). In such instances, a defendant “may be required to pay  
11 restitution and forfeit the same amounts.” *Carter*, 742 F.3d at 446 (citing cases). Further, a defendant  
12 has no right to a credit against a restitution order equal to any part of the amount forfeited. *Id.*

13  
14 In this case, the property that was derived from proceeds that the Defendant and her  
15 coconspirators obtained directly or indirectly pursuant to the conspiracy to commit bank and wire fraud,  
16 include the real properties Hillview and Cadiz. They also include the amount of the loans approved and  
17 paid out by the financial institutions. The total amount of those loans was \$2,118,000. The government  
18 believes that the probation officer has properly and accurately stated the law in the PSR. The  
19 superseding indictment did include a forfeiture notice. [ECF No. 64]

#### 20 21 IV. CONCLUSION

22 The United States’ concurs with the PSR’s total offense level calculation. Based on the  
23 foregoing, the United States recommends that Defendant Elena Moreno be sentenced to a term of 33 to  
24 37 months’ imprisonment, 3 years’ supervised release, and restitution to the financial institutions that  
25 were defrauded. The government submits that this sentence is sufficient, but not greater than necessary,  
26  
27

1 to accomplish the goals of the Sentencing Reform Act and that a lesser sentence is not supported by the  
2 facts or the application of the factors under 18 U.S.C. § 3553(a).

3  
4 Dated this 15th day of January, 2015.

5 Respectfully submitted:  
6 MELINDA HAAG  
United States Attorney

7  
8 /s/ Katherine L. Wong  
KATHERINE L. WONG  
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9  
10 /s/ Todd P. Kostyshak  
TODD P. KOSTYSHAK  
Trial Attorney, Tax Division

11  
12 Attorneys for the United States

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Government's Sentencing Memorandum was served on all parties named below on January 15, 2015.

☐ United States Mail, postage prepaid  
☐ Hand delivery  
☐ Facsimile Transmission (fax)  
☐ Federal Express  
☒ ECF Filing

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